

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

BILLY C. RAMEY and
OPAL A. RAMEY,

Debtors.

No. 95-21487
Chapter 7

MARGARET B. FUGATE, TRUSTEE,

Plaintiff,

vs.

Adv. Pro. No. 96-2011

SULLIVAN COUNTY EMPLOYEES
CREDIT UNION,

Defendant.

M E M O R A N D U M

APPEARANCES :

MARGARET B. FUGATE, ESQ.
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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This is an action by the chapter 7 trustee, Margaret B. Fugate (the "Trustee"), seeking the avoidance and recovery of an alleged preferential transfer to the defendant, Sullivan County Employees Credit Union (the "Credit Union"), pursuant to 11 U.S.C. § 547(b). The Trustee has moved for summary judgment asserting that there are no genuine issues of material fact in dispute and that she is entitled to judgment as a matter of law in the amount of \$13,700.00. The court agrees. This is a core proceeding. See 11 U.S.C. § 157(b)(2)(F).

I.

The following facts are not in dispute. On June 1, 1995, debtor Opal Ramey purchased a 1995 Nissan automobile from Bill Gatton Nissan for a total purchase price of \$16,461.57. The purchase was financed by a loan obtained from the Credit Union by the debtors that same day for \$16,616.51, representing the purchase price plus fees. The loan was evidenced by a promissory note and security agreement executed by the debtors on June 1, 1995, which granted the Credit Union a security interest in the automobile to secure repayment of the debt. The note provided for monthly payments of \$351.14 with the first payment being due July 1, 1995.

The debtors surrendered the automobile to the Credit Union

on June 30, 1995, before the first payment was due. Neither the pleadings nor the evidence tendered to the court in connection with the Trustee's motion for summary judgment provide any explanation as to what brought about the surrender or how it occurred. The Credit Union sold the automobile to a third party for \$13,700.00 on August 14, 1995, and in a letter to Opal Ramey that same day, made demand on her for payment of the deficiency balance in the amount of \$2,920.42 which was owed under the promissory note. The record does not indicate whether the Credit Union applied to have its lien noted on the title of the automobile, but the certificate of title issued by the state of Tennessee on July 15, 1995, listed no liens and named Opal Ramey as the registered owner of the automobile.

The debtors initiated this chapter 7 case by the filing of a voluntary petition on September 22, 1995, and this action was thereafter commenced by the Trustee on February 13, 1996. In her motion for summary judgment filed on April 3, 1996, the Trustee asserts that the transfer of the automobile to the Credit Union on June 30, 1995, is an avoidable preference as defined by 11 U.S.C. § 547(b) because it was made within 90 days of the debtors' bankruptcy filing, while the debtors were insolvent, in payment of an antecedent debt, and enabled the Credit Union to receive more than it would have received in a

chapter 7 case but for the transfer since the Credit Union's unperfected lien could have been avoided by the Trustee pursuant to her powers as a judgment lien creditor under § 544(a) of the Bankruptcy Code. The documents pertaining to the initial purchase transaction and subsequent transfer which is at issue, including the promissory note and security agreement, the certificate of title, the August 14, 1995 demand letter, a retail buyers order for the automobile dated May 30, 1995, and the Credit Union's June 1, 1995 check for the purchase in the amount of \$16,461.57, jointly payable to Opal Ramey and Bill Gatton Nissan, are presented by the pleadings, the Trustee's affidavit, and the Trustee's supplemental memorandum of law. There is no dispute between the parties as to the validity of any of those documents.

The Credit Union has filed a response in opposition to the motion for summary judgment asserting that summary judgment is not appropriate because there is a genuine dispute as to material facts and that the Trustee is not entitled to judgment as a matter of law. Despite the assertion that a factual dispute exists, no affidavit setting forth facts contrary to those contained in the Trustee's affidavit was tendered in opposition to the motion and the Credit Union states in its response that "generally the facts are not disputed in this

cause."

The Credit Union does assert three arguments as to why the Trustee is not entitled to judgment as a matter of law: (1) the debt between the parties never "took effect" and no transfer "took place" for purposes of 11 U.S.C. § 547(b) because the debtors made no payments on the debt and voluntarily surrendered the automobile even before the first payment was due; (2) the Credit Union's security interest in the automobile was perfected by possession or in the alternative, the Credit Union did not have a reasonable period of time in which to perfect its lien on the title because the automobile was surrendered to it less than 30 days after the debt was incurred; and (3) even if the court finds that the transfer is avoidable as a preference under § 547(b), the transfer is excepted from avoidance pursuant to the contemporaneous exchange exception of 11 U.S.C. § 547(c)(1). Accordingly, the court will consider these arguments while applying the pertinent law to the undisputed facts.

II.

Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment, the inference to be drawn from the underlying facts contained in the record must be viewed in a light most favorable to the party opposing the motion. See *Schilling v. Jackson Oil Co. (In re Transport Associates, Inc.)*, 171 B.R. 232, 234 (Bankr. W.D. Ky. 1994), citing, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986). See also *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989), *hearing denied* (1990). "[A]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but ... by affidavits or ... otherwise ..., must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e). See *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986).

III.

11 U.S.C. § 547(b) provides as follows:

Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The burden of proving the avoidability of a transfer under section 547(b) lies with the Trustee while the burden of proving the applicability of an exception to a preference under § 547(c) is on the creditor. 11 U.S.C. § 547(g). See also *Logan v. Basic Distribution Corp. (In re Fred Hawes Organization, Inc.)*, 957 F.2d 239, 242 (6th Cir. 1992), *rehearing denied* (1992).

Without regard for the moment to the defenses and issues raised by the Credit Union in its objection to the motion for summary judgment, the Trustee is correct that the undisputed facts in this case establish all the elements of an avoidable

preference under § 547(b). It is undisputed that the debtor Opal Ramey purchased the Nissan automobile and the certificate of title listed her as the registered owner. 11 U.S.C. § 101(54) defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property" There appears to be no question that the debtors relinquished any and all interest they had in the automobile when they surrendered the vehicle to the Credit Union on June 30, 1995. Thus, there has been a "transfer of an interest of the debtor in property" as required by § 547(b).

The next element of a preference, § 547(b)(1), that the transfer be "to or for the benefit of a creditor," is also established by the undisputed facts. The Credit Union is presently, and was at the time of the transfer, a creditor of the debtors because the Credit Union possesses "a right to payment"¹ from the debtors as evidenced by the promissory note executed by the debtors on June 1, 1995, obligating the debtors to pay the Credit Union the sum of \$16,617.57. The transfer to the Credit Union was on account of an antecedent debt owed by

¹11 U.S.C. § 101(5)(A) defines "claim," as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."

the debtors before the transfer was made as required by § 547(b)(2). The debtors surrendered the automobile to the Credit Union because they were indebted to the Credit Union under the terms of the promissory note and the transfer reduced that indebtedness. Subsection (4) of § 547(b) is also satisfied since the transfer to the Credit Union was made within 90 days of the filing of the petition. The debtors surrendered the automobile to the Credit Union on June 30, 1995, and the debtors filed bankruptcy 84 days later on September 22, 1995.

The insolvency element of a preference set forth in section 547(b)(3), that the transfer be made while the debtor was insolvent, is supplied by 11 U.S.C. § 547(f) which creates a presumption of insolvency during the 90 days immediately preceding the filing of the bankruptcy petition. Because the Credit Union has tendered no evidence challenging the debtors' insolvency, the presumption of insolvency is conclusive and this requirement is deemed established. See *Whittaker v. Citra Trading Corp. (In re International Diamond Exchange Jewelers, Inc.)*, 177 B.R. 265 (Bankr. S.D. Ohio 1995), *reconsideration denied*, 188 B.R. 386 (1995).

The final requisite element of a preference, § 547(b)(5), that the transfer enable the creditor to receive more than the creditor would have received if the transfer had not been made,

is established by the Trustee's affidavit. The Trustee recites therein that she has determined that there are no assets available for distribution to unsecured creditors of the estate except for the avoidance of this transfer. She notes that because the debtors surrendered the automobile to the Credit Union, which presumably had a value of \$13,700.00 since that was the amount for which it sold, the Credit Union received 82.43% of its claim. If the transfer had not been made, the Trustee could have avoided the Credit Union's unperfected security interest,² resulting in the Credit Union having an unsecured claim for the total amount it was owed under the promissory note, \$16,616.51. Adding this amount to the scheduled unsecured debts of \$8,326.92 for total unsecured claims of \$24,943.43, unsecured creditors would have received only 55% of their claims from an estate of \$13,700.00. Thus, the Credit Union's receipt of 82.43% of its claim, when it would have received only 55% if the transfer had not been made, establishes the final element of a preference set forth in § 547(b)(5). See *Luper v. Southeastern Equipment Company, Inc. (In re Walls)*, 91 B.R. 825

²See *Still v. Commerce Union Bank of Nashville (In re Custom Caps, Inc.)*, 1 B.R. 99, 102 (Bankr. E. D. Tenn 1979) ("[U]nder Tennessee law a security interest in a motor vehicle (other than inventory) is not enforceable against the trustee in bankruptcy unless the security interest is indicated on the outstanding certificate of title.").

(Bankr. S.D. Ohio 1988) (chapter 7 debtor's prepetition return of equipment purchased on credit constituted preferential transfer in that creditor had failed to perfect its security interest and thus received more than it would have under chapter 7 liquidation if transfer had not been made).

That being said, the court will examine the issues raised by the Credit Union to determine if they affect the court's conclusion or if an exception to avoidance is applicable notwithstanding the preference. The court will first address the Credit Union's interrelated assertions that the debt never took effect and no transfer took place for purposes of § 547(b) because no payments were made on the promissory note and the debtors surrendered the automobile to the Credit Union before the first payment was even due. Although this argument was not developed in the Credit Union's brief, presumably the Credit Union is asserting that the early return of the vehicle somehow rescinded or nullified the transaction such that it may no longer provide the foundation for a preference. The Credit Union cites no authority in support of this proposition and the court knows of none, absent agreement of the parties to rescind, either after the fact or pursuant to an express provision in the promissory note and security agreement that the note and agreement would be rescinded if this contingency occurred. The

Credit Union has tendered no evidence establishing that this was the agreement of the parties and there is nothing in the note and security agreement which would suggest rescission under these circumstances or any other such contingency. To the contrary, the Credit Union's action in making demand on the debtor Opal Ramey for the deficiency balance on the promissory note after it sold the automobile to a third party indicates that no rescission occurred and that the Credit Union considered the debt still in effect.

However, even if the Credit Union were to establish that purchase and loan had been mutually rescinded or nullified by the surrender, an avoidable preference still has occurred. "The rescission of an unperfected 'secured' transaction during the 90 days before bankruptcy is the essence of an avoidable transfer." *Waldschmidt v. Chrysler Credit Corp. (In re Messenger)*, 166 B.R. 631, 635 (Bankr. M.D. Tenn. 1994). In *Messenger*, Chrysler Credit argued that because there had been a mutual rescission of the purchase, the antecedent debt relied upon by the trustee had been extinguished so there was no preference. *Id.* at 634. The court disagreed, finding that the rescission defense proved all the elements of an avoidable preference – the return was a transfer and the rescission gave Chrysler Credit more than it would have received had the transfer not occurred because a

trustee could have avoided the untimely perfection of its security interest. *Id.* at 635. The court observed that allowing rescission as a preference defense would emasculate the preference doctrine:

Chrysler's position would enshrine "mutual rescission" as the perfect preference defense. Every unpaid seller willing to accept return of the goods in satisfaction of its unpaid debt would "rescind" and escape preference scrutiny. What lender with a debt in default would not accept "rescission" rather than "repayment" if the characterization would insulate the lender from preference recovery in the event of bankruptcy within 90 days?

Id.

Similarly, the Credit Union's argument that it did not have a reasonable amount of time in which to perfect its lien on the title because the vehicle was surrendered within 30 days of the purchase does not prevent the transaction from being a preference. The law does not provide "a reasonable amount of time" in which to perfect a purchase money security interest such that it will be protected from avoidance. Instead, the Bankruptcy Code establishes a fixed amount of time, within twenty days after the debtor receives possession of the property. See 11 U.S.C. § 547(c)(3). Perfection thereafter is avoidable, provided the other elements of a preference are established. See, e.g., *Walker v. Ford Motor Credit Co. (In re Clark)*, 112 B.R. 226, 229 (Bankr. E.D. Tenn. 1990) (creditor's

security interest could be avoided as a preferential transfer where perfection occurred more than ten [now twenty] days from the date the debtors granted security interest). In the present case, not only was this time requirement not met, but at no time was the lien noted on the certificate of title. Accordingly, this argument provides no defense to the Trustee's preference action.

The Credit Union's assertion that it perfected its lien by possession also fails. Tennessee law is clear that perfection of a security interest in a motor vehicle may be effectuated only by notation of the lien upon the certificate of title. See TENN CODE ANN. § 55-3-126(b)³; *Waldschmidt v. Associates Commercial Corp. (In re Groves)*, 64 B.R. 329 (Bankr. M.D. Tenn. 1986), *aff'd*, 75 B.R. 227 (M.D. Tenn. 1987)(under Tennessee law, liens on pledged motor vehicles can only be perfected by notation of lien on title and not by possession); and *Coble Systems, Inc. v. Coors of Cumberland, Inc. (In re Coors of the Cumberland, Inc.)*, 19 B.R. 313 (Bankr. M.D. Tenn. 1982).

³The pertinent version of that statute in effect at the time of the initial purchase by the debtor Opal Ramey and the subsequent transfer of the automobile to the Credit Union was repealed in 1996 and replaced with a new section 55-3-126. However, the requirement that the Credit Union's lien be noted on the certificate of title to perfect its security interest was not changed. See 1996 Tenn. Pub. Acts 687 (H.B. 2436).

Lastly, the Credit Union asserts that notwithstanding any finding of a preference, avoidance thereof is excepted by the contemporaneous exchange exception set forth in § 547(c)(1) which precludes from avoidance a transfer "intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor" and which was "in fact a substantially contemporaneous exchange." The Credit Union does not explain how this exception is applicable, but simply alleges that "the transfer was a contemporaneous exchange occurring in the ordinary course or [sic] business or financial affairs of the transferee ... and the Debtor." Although the Credit Union cites § 547(c)(1) for this proposition, the above quote is a juxtaposition of both the contemporaneous exchange exception of § 547(c)(1) and the ordinary course of business exception found in § 547(c)(2).⁴

Nevertheless, the evidence before the court fails to

⁴11 U.S.C. § 547(c)(2) provides that a trustee may not avoid a transfer to the extent that the transfer was

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms.

establish either of these exceptions. To prevail under the contemporaneous exchange exception, it must be established that the transfer was an exchange for new value; that the exchange was intended by the parties to be substantially contemporaneous; and that the exchange was in fact substantially contemporaneous. 11 U.S.C. § 547(c)(1). See 4 COLLIER ON BANKRUPTCY ¶ 547.09 (15th ed. 1995). The transfer which the Trustee is seeking to avoid is the debtors' transfer of the automobile to the Credit Union on June 30, 1995. The Credit Union gave no new value for this transfer. Rather, the only value⁵ given by the Credit Union was when it extended the loan on June 1, 1995, and this value was given in exchange for the debtors' execution of the promissory note and grant of a security interest in the automobile, not for the unanticipated return of the automobile which occurred 30 days later. This fact also precludes the necessary intent element. The value given by the Credit Union, the loan, was not intended by the parties to be a substantially contemporaneous exchange for the return of the automobile because the purpose of the loan was to allow the debtor to purchase an automobile, not

⁵The fact that the Credit Union reduced the debt by the value subsequently received for the automobile does not constitute "new value." "A transfer of property to extinguish an antecedent debt is the essence of a preference, not the essence of a preference defense." *In re Messenger*, 116 B.R. at 636.

for the automobile to be surrendered to the Credit Union by the debtors.

With respect to any assertion of an ordinary course of business exception, it similarly must fail. No evidence has been tendered to this court, by affidavit or otherwise, to establish the necessary elements of this exception: that the debt was incurred and the transfer made in the ordinary course of business or financial affairs of the debtors and the Credit Union and that the transfer was made according to ordinary business terms. See 11 U.S.C. § 547(c)(2). As stated above, the mere assertion of the exception does not defeat an appropriate summary judgment motion. See Fed. R. Civ. P. 56(c). The Credit Union having the burden of proof on this issue and having failed to carry that burden, the court can not conclude that the preferential transfer to the Credit Union is protected by the ordinary course of business exception.

IV.

This court having concluded that the transfer of the automobile to the Credit Union by the debtors is an avoidable preference and that no exception applies, the Trustee is entitled to recover under 11 U.S.C. § 550(a) the value of the property transferred. The Credit Union obtained the sum of

\$13,700.00 from the sale of the automobile and apparently the Trustee does not dispute that this was the value of the automobile since she has requested a judgment in this amount. Accordingly, an order will be entered in accordance with this memorandum opinion granting the Trustee's motion for summary judgment and awarding the Trustee a judgment in the amount of \$13,700.00.

FILED: May 17, 1996

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE